Thomson, J. : — I have enjoyed the advantage of reading the judgment of the learned President and am in entire agreement with what he has said. As, however, we are disagreeing with the learned trial Judge I feel I should add a few words of my own.

I agree that the question of whether it was the intention of the parties that the agreement of 6th October, 1950 (the second agreement) should rescind that of 1st November, 1949 (the first agreement) is a question of fact. I have failed, however, to find any material in the case which would support the inference that there was any such intention.

Under the first agreement, the appellant got two things which he could not be deprived of without his own consent. One of these was the use of the respondent's business, if I may use a compendious if perhaps not very accurate expression, for a period of eighteen months, and the second was that after the expiration of that period of eighteen months he was to have on defendant's premises sufficient space for his stamp business at a reasonable rent.

The second agreement dealt with the first of these things but not with the second. By it the appellant gave up approximately seven months' use of the respondent's business in return for agreement as to the exact extent of the financial claims against him under the first agreement which may or may not have been good consideration, a point which I find it unnecessary to decide for the purpose of the present proceedings. In this, and there is no more, I can find nothing to support the inference that the appellant in return for the very slight, if any, consideration that flowed to him under the second agreement intended to give up the right to space for his stamp business which he had acquired under the first agreement in addition to the seven months use of the business which he clearly did intend to give up.

In the circumstances, the respondent not being prepared to carry out the portion of the first agreement relating to the stamp business, is clearly not entitled to specific performance of the second agreement.

I agree that judgment in the Court below should be entered for the defendant, the present appellant, with costs. As appellant does not ask for costs of the appeal I would make no order.

Storr, J. : — I agree with the learned President and have nothing to add.

Appeal allowed.

Action for specific performance dismissed.

RM. THIRUPPATHI CHETTIAR & ANOR. v. TEH KEONG KHENG.

[Orig. Civ. Juris. (Wilson, J.) February 11, 1952]

[Kuala Lumpur — Civil Suit No. 53 of 1950]

Japanese Judgments and Civil Proceedings Ordinance, 1946 — Executors — Agreement for sale of land subject to conditions — Civil Procedure Code, ss. 467(i)(f), 469(a).

During the Japanese Occupation of Malaya, by an agreement in writing dated June 1st, 1945, the administrator with will annexed agreed to sell land subject to his obtaining the approval of the Japanese High Court and subject to the defendant obtaining the approval of the Japanese Governor. The approval of the Court was obtained and an application to the Governor was made but the approval was never received as soon after the Japanese surrendered. In November 1945 the plaintiffs became administrators of the deceased and they sought a declaration that the agreement was null and void and of no effect on the grounds that: (i) the application to sell was made ex parte and no notice of it was served on or given to any person beneficially interested; (ii) the order of the Japanese did not approve the sale to the defendant specifically; and (iii) the approval of the Japanese Governor was not obtained.

Held, that as some beneficiary in India had not been served the order of the Japanese Court was a nullity but the Court had no inherent jurisdiction to set aside orders of the Courts of the Occupying Power and proceedings under the Japanese Judgments and Civil Proceedings Ordinance must be instituted. The order of the Japanese Court approved a sale in general, i.e., to any person and so included the defendant. As the defendant had, without undue delay, applied for the Governor's approval, such approval not having been refused made unnecessary after the Japanese surrender the plaintiffs could not rely on the objection that the approval was not obtained.

Cases referred to :—

(1) *Graig v. Kanssen* (1943) K.B. 256.

(2) *Yeap Lean Seng & Ors. v. Kok Ho Teik & Anor.* (1951) M.L.J. 235.

CIVIL SUIT.

F. G. Charlesworth for the plaintiffs.

H. Y. Teh for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. :— The plaintiffs, as the attorneys of Valliammai Achi and Meenatchi Achi, the widows of one Sethuramaswamy Chettiar, are the administrators in the Federation of Malaya of the Estate of Sethuramaswamy Chettiar. Sethuramaswamy Chettiar died in India on 2nd February, 1941, and appointed his father S. P. L. R. M. Raman Chettiar as his executor. By an Order made by the Supreme Court of the Federated Malay States at Ipoh on the 30th day of June, 1941, it was ordered that Letters of Administration be granted to one Letchumanan Chettiar as

attorney of the said S. P. L. R. M. Raman Chettiar. The Letters of Administration with the Will of the deceased annexed was issued to the said Letchumanan Chettiar on 2nd June, 1944, and on the 10th October, 1944 pursuant to an Order made by the Japanese High Court at Kuala Lumpur the said Letters of Administration were re-sealed by the Japanese High Court of Selangor. S. P. L. R. M. Raman Chettiar died in India on the 28th day of November, 1945, and thereupon the Letters of Administration with the Will annexed granted to the said Letchumanan Chettiar ceased to be of any force or effect.

In the meantime, however, by an agreement in writing dated the 1st day of June, 1945, made between Letchumanan Chettiar and the defendant Letchumanan Chettiar agreed to sell certain lands in Selangor to the defendant at the cost of a sum of $33,000 paid by the defendant in occupation currency, subject to the said Letchuman Chettiar obtaining the approval of the Japanese High Court in Kuala Lumpur for the sale of the said lands to the defendant and subject to the defendant obtaining the approval of the Japanese Governor of Selangor for the purchase by him of the said lands. Letchumanan Chettiar applied to the Japanese High Court at Kuala Lumpur for leave to sell the lands. An Order was made on the 17th day of July, 1945, granting leave to him to sell the land at the price of $33,000 in occupation currency. It is conceded that an application was made to the Japanese Governor on the 25th July, 1945, by the defendant for leave to purchase the lands in question, but the Japanese surrendered shortly afterwards and, in fact, the approval of the Japanese Governor was never received.

The plaintiffs claim that the agreement of the 1st day of June, 1945 is null and void and of no legal effect. They ask for a declaration to that effect and consequential relief.

The claim is based on three contentions: First, it is said that the application to the Japanese Court for permission to sell to the defendant was made *ex parte* and notice thereof was not served on or given to any person beneficially interested in the estate, and that therefore the Order of the Japanese Court was a nullity; secondly it is said that the Order of the Japanese Court did not approve the sale of the lands to the defendant whose name did not appear in the Order; thirdly, it is said the approval of the Japanese Governor of Selangor was not obtained. Under section 467(i) (f) and section 469(a) of the Civil Procedure Code it is laid down that any application to a Court for the approval of any sale must be served on the person or one of the persons whose rights or interest are thought to be affected. This was not done. I am satisfied on the evidence that there were persons in India at the time of the agreement who were beneficially interested in the Estate of Sethuramaswamy Chettiar. I am also satisfied that Letchumanan Chettiar must have been aware of the existence of these persons. They were in fact outside the jurisdiction of the Japanese Court and service upon them of the application to the Japanese Court could not have been effected. Having regard, however, to the conclusions to which I have come, it is not necessary to consider whether those facts are material. I base my decision on this issue on the assumption that the Japanese Court had no power to make the Order granting leave to sell in the absence of, at any rate, one of the interested persons. Mr. Charlesworth has argued on the authority of the case of *Graig v. Kanssen*[1] that the failure to serve an interested party makes the Order null and void and that being so it was not necessary for the plaintiffs to apply under the Japanese Judgments & Civil Proceedings Ordinance, 1946 (No. 29 of 1946) for the Order of the Japanese Court to be set aside. No doubt it was decided in the case of *Graig v. Kanssen*[1] *supra* that a person who is affected by an Order which can properly be described as a nullity was entitled *ex debito justitiae* to have it set aside, and that the Court has an inherent jurisdiction to set aside the Order and it is not necessary to appeal from the Order. However that may be, and I do not dispute it, I agree with the views expressed by Spenser Wilkinson, J. in *Yeap Lean Seng & Ors. v. Kok Ho Teik & Anor.*[2] that this Court has no inherent jurisdiction to set aside Orders of the Courts of the occupying power. I agree with him that there must be some statutory provision to enable this Court to do so, and undoubtedly it was for this purpose, *inter alia,* that Ordinance No. 29 of 1946 was passed. I think it is clear on the authority of *Graig v. Kanssen*[1] that an Order which can properly be described as a nullity must be set aside in some form or other before it ceases to be effective. I am of opinion that this Court has no power in this suit to set aside the Order of the Japanese Court, and it is not disputed that no proceedings were ever taken under Ordinance No. 29 of 1946 to set aside the Japanese Order. The Japanese Order was, in fact, made, and I find that it cannot now be deemed by this Court to be ineffective.

On the second point that the Order did not approve of the sale of the said lands to the defendant I find that as the Order approved for selling generally

i.e. to any person, it cannot be said that it did not approve the sale of the land to the defendant.

At the time of the agreement on the 1st day of June, 1945, no doubt it was necessary, before the transaction could be completed for the defendant to obtain the approval of the Japanese Governor of Selangor. The defendant, in fact, did apply to the Japanese Governor, and I do not think there was any undue delay in his making the application. It cannot be said that the approval of the Japanese Governor was ever refused. He, in fact, left the Federation shortly afterwards without granting or refusing approval. Paragraph 4 of the agreement reads as follows:—

"The parties hereto agree that should the High Court refuse to grant to the Vendor leave to sell the said property to the Purchaser or if such leave having been granted approval of the said purchase is refused by His Excellency the Governor of Selangor then in either of such cases, this agreement shall become null and void and the deposit of $33,000 now paid shall then be refunded by the Vendor to the Purchaser."

Having regard to the fact that the approval of the Japanese Governor was never refused, and that subsequent to his departure it became unnecessary for his approval to be obtained in order to legalise the sale, I am of opinion that the plaintiffs cannot now rely on the fact that the approval was not obtained in order to establish that the agreement of the 1st day of June, 1945 is null and void and of no legal effect.

As a result I give judgment for the defendant with costs.

Judgment for the defendant.

CHOP CHIN SOON HENG v. CHOP SIN HOCK HIN & ORS.

[Orig. Civ. Juris. (Spenser Wilkinson, J.)
February 13, 1952]

[Penang — Civil Suit No. 424 of 1950]

Libel — Qualified privilege — Evidence of malice —Submission of no case.

Two paragraphs in a letter by the defendants to the Controller of Supplies contained matter which the plaintiffs said were libellous. The plaintiffs conceded that the letter was written in circumstances rendering its writing an occasion of privilege. At the conclusion of the plaintiffs' case the defendants submitted that there was no evidence of malice such as would entitle the plaintiffs to succeed; the defendants did not elect one way or another whether they proposed to call any evidence.

Held, that in a trial before a Judge alone a ruling on a submission that there is no evidence of malice will only be made after all the evidence has been heard. If, therefore, the defendants wish to make this submission at the close of the plaintiffs' case they must elect to call no evidence and rest upon the submission.

Cases referred to:—

(1) *Alexander v. Rayson* (1936) 1 K.B. 178.
(2) *Laurie v. Raglan Building Co. Ltd.* (1942) 1 K.B. 153.
(3) *Parry v. Aluminium Corporation* 162 L.T. 236.
(4) *Young v. Rank* (1950) 2 All E.R. 166.
(5) *Marbe v. George Edwards Ltd.* (1928) 1 K.B. 269.

ACTION for damages.

R. D. Hume for the plaintiffs.

F. G. Pooley for the defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The plaintiffs' claim in this case is for damages for libel contained in a letter written by the defendants to the Controller of Supplies, Federation of Malya on the 16th September, 1950. Two paragraphs in that letter are particularly relied on as being libellous.

It was conceded at the outset by Counsel for the plaintiffs that the letter in question was written in circumstances which rendered the occasion of its writing an occasion of qualified privilege.

At the conclusion of the case for the plaintiffs Counsel for the defendants submitted that the words complained of were not capable of a defamatory meaning and that there was no evidence of malice such as would entitle the plaintiffs to succeed in the action. He did not, however, make any election one way or the other as to whether or not he proposed to call any evidence.

After careful consideration of the authorities I have come to the conclusion that as regards the submission upon the question of whether or not there is any evidence of malice I ought not to give a ruling until all the evidence has been called. If Counsel for the defendants will now state that he intends to rely on the submission alone and to call no evidence I will then be prepared to give a ruling on the subject, but if not, then I must hear the whole of the evidence before reaching a decision on this point.

The law on this subject is stated in *Odgers* on Pleadings and Practice in the chapter headed "Trial" at page 257 as follows:—

"The defendant's counsel must now make up his mind whether to call evidence or whether to submit that the plaintiff has made out no case to answer in law. He will not nowadays be allowed to submit no case unless